In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No. 1511 145

TITLE INSURANCE AND GUARANTY COMPANY, ELIZABETH HUMPHREY, HARRY LEE JONES, JULIAN M. EDWARDS and MARJORIE B. EDWARDS,
Petitioners (Appellants below,)
vs.
JAMES P. HART, Trustee of Mount Gaines Mining Company, Debtor,
Respondent (Appellee below.)

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

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Subject Index

Table of Authorities Cited

Statutes

Texts

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To the Honorable Fred M. Vinson, Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

The above named petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause (R. 1449-1450), affirming the judgment of the District Court of the United States for the District of Nevada. (R. 136-140.)

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals and dissenting opinion (R. 1409-1449) are reported in *Title Insurance and Guaranty Co. v. Hart,* 9 Cir. 160 Fed. (2d) 961.

The opinion of the District Court (R. 136-140) is not reported.

JURISDICTION.

Final judgment in the District Court in said cause was entered October 30, 1945, in favor of James P. Hart, as trustee, petitioner. (R. 136-140.)

On November 29, 1945, petitioners (respondents in the trial Court) appealed to the Circuit Court of Appeals for the Ninth Circuit from the judgment of the District Court. (R. 146.)

On January 8, 1947, the Circuit Court of Appeals for the Ninth Circuit affirmed the said judgment of the District Court. (R. 1449-1450.)

A timely petition for rehearing was denied on March 24, 1947. (R. 1450.) Order directing amendment of opinion of the Circuit Court of Appeals and a substitution of a new dissenting opinion was filed March 24, 1947. (R. 1450-1451.) An order was made on March 27, 1947, by said Circuit Court of Appeals staying the issuance of the writ of mandate to May 1, 1947. On April 24, 1947, an order was made by said Circuit Court of Appeals further staying the issuance of the writ of mandate to and including June 1, 1947, and on May 29, 1947, an order was made by said Circuit Court of Appeals further staying the issuance of the writ of mandate to and including June 24, 1947.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Sec. 1, 43 Stat. 938, 28 U. S. C. A., Sec. 347(a); and under Section 24(c) of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 553; as amended by the Act of June 22, 1938, c. 575, Sec. 1, 52 Stat. 854; 11 U. S. C. A. Supp. Sec. 47(c).

QUESTIONS PRESENTED.

In a controversy in a Chapter X reorganization proceeding in bankruptcy as to whether or not the trustee had exercised an option in a mining lease for

its renewal, which renewed lease would be a ten year extension of the original lease, the following questions are involved:

(1) Does the provision in Section 70b of the Bankruptcy Act that:

> "Within sixty days after the adjudication, the trustee shall assume or reject * * * unexpired leases of real property: Provided, however, that the Court may for cause shown extend or reduce such period of time, any such * * * lease not assumed or rejected within such time, whether or not a trustee has been appointed or has qualified shall be deemed to be rejected."

apply to Chapter X reorganization proceedings in bankruptcy?

(2) Is the lease dated December 16, 1933, referred to in this action to be deemed rejected in the absence of any allegation or proof that the trustee assumed it in conformity with the said provision of Section 70b of the Bankruptcy Act?

(3) Is the lease referred to in this action to be deemed assumed whether or not the said provision of Section 70b of the Bankruptcy Act applies to Chapter X reorganization proceedings in bankruptcy, where it does not appear from the record that the trustee obtained from the District Court an order authorizing him to assume the lease *cum onere,* or that thereafter he filed in the proceedings his written declaration that he assumed the lease?

(4) Should the Federal Courts in this action give effect to the State local law governing the substantive

rights of the lessors and lessees in respect to the following:

(a) The provision in the lease that: "Time is the essence of this agreement"?

(b) The respective rights of the offerer and offeree in an option in the lease for a renewal or extension of the lease?

(c) Whether or not the Court can relieve the offeree in an option in a lease for a renewal or extension of such lease from the effect of a termination of such option by reason of his failure to comply with the conditions precedent thereof?

STATUTES INVOLVED.

Section 70b of the Bankruptcy Act (11 U. S. C. A. Sec. 110b) (see page 17.)

California Civil Code Section 1436 (see page 26);

California Civil Code Section 1439 (see page 26);

California Civil Code Section 1492 (see page 31);

California Civil Code Section 1587 (Sub. 3) (see page 27);

California Civil Code Section 3275 (see page 31).

STATEMENT OF THE CASE.

On December 1, 1934, Mount Gaines Mining Company, a Nevada corporation, succeeded to all the rights of the lessees in a mining lease executed in the State of California by residents of California, dated December 15, 1933, on the Mount Gaines Mine situated in Mariposa County, California. (R. 27.)

The lease, *inter alia*, contained the following provisions:

> "That all operations of said Lessees shall be in accordance with the laws and mine and milling regulations of the state of California." (R. p. 39.)
>
> "That Lessees shall pay as a royalty to the owner ten per cent (10%) of all production of and from said mine, from the gross returns of ores shipped and sold, the returns from all recovery of ores milled, concentrates, amalgams, mint returns or bullion." (R. p. 39.)
>
> "That all payments shall be made * * * not later than the 25th day of following calendar month." (R. p. 39.)
>
> "That the Lessees * * * shall keep complete records of operations, accounts, mining maps and production, to be open to full inspection of the owner at any time." (R. pp. 40-41.)
>
> "That should the Lessees fail to keep any of the covenants herein provided, or to carry out any of said covenants contained, then the owner shall be released therefrom and enter forthwith into possession of said mine and all property thereon." (R. p. 41.)
>
> "* * * that any failure of the owner to insist upon a strict compliance of the terms of this

agreement by the Lessees shall not constitute or be deemed a waiver of the right of the owner to insist upon such compliance." (R. p. 41.)

"Time is the essence of this agreement." (R. p. 43.)

The lease also contained the following option:

"In consideration of, and the faithful compliance thereto by said lessees of the foregoing agreement and covenants therein, the said owner agrees that upon written application of the lessees to grant unto said lessees a further lease upon said mine, its improvements and acquisitions, and extension of this lease for a further term of ten years under the same covenants, royalties and rights." (R. pp. 41-42.)

On June 29, 1939, Mount Gaines Mining Company petitioned the United States District Court for the District of Nevada that it be adjudged a debtor in a Chapter X reorganization proceeding in bankruptcy. (R. 2-15.)

The District Court granted the petition on June 29, 1939, and in its order directed the debtor to continue temporarily in possession of the Mount Gaines Mine under the terms of the said lease and to operate the mine and pay royalties from net proceeds. (R. 16-20.) On August 11, 1939, James P. Hart was appointed trustee and the debtor in possession was ordered to turn over its assets to the trustee. (R. 25.)

On December 2, 1943, the District Court upon petition by Hart, as trustee, ordered him to make demand for the extension of the agreement of lease with

option to purchase "*now owned by Mount Gaines Mining Company* for the said Mount Gaines Mine." (R. 970-972.)

On December 3, 1943, Hart as trustee made application to lessors for a further lease which would be a ten year extension of the lease mentioned and would contain an option to purchase an undivided ¾ths interest in the leased premises in all respects as was set forth in the original lease. (R. 52-54.) Hart's request was refused. (R. 55-56.)

On September 9, 1944, Hart as trustee filed in the District Court a petition which became the basis of the judgment below. (R. 26-35.) This petition was for an order directing the owners of the leased Mount Gaines Mine to show cause why they had "failed, refused and neglected to give and grant unto trustee an extension of the lease and option to purchase."

Hart's petition, inter alia, alleged that Mount Gaines Mining Company, the debtor, since December 1, 1934, "has been and now is in the sole and exclusive possession of all said mining claims, operating said mines and mining claims in accordance with the agreements and covenants contained in said lease with option to purchase, and has complied with all of the terms and conditions contained therein and has duly performed all conditions on its part" (R. 28-29); that the refusal of lessors to grant a renewal lease "has cast a cloud upon the right and title of the *Mount Gaines Mining Company* to hold, operate and to sell and dispose of ores mined on said Mount Gaines Mine * * *" (R. 35.) The prayer in Hart's

petition was: "That the written application for an extension of said agreement of lease and option, * * * had the effect and did, extend the said lease and option dated December 16, 1943, to December 16, 1953, to your petitioner and to the said *Mount Gaines Mining Company* * * *" (R. 36), and that lessors "* * * be restrained and enjoined from in any manner interfering with the rights of the *Mount Gaines Mining Company* and your petitioner in the protection and securing the rights of said debtor corporation, *Mount Gaines Mining Company.*" (R. 37.) (Italics supplied.)

There was no allegation in Hart's petition that he, as trustee had ever *assumed* the lease and there was no allegation therein that Hart as trustee ever acquired any right, title or interest in said lease and options therein. Mount Gaines Mining Company, the debtor, was not a party to said controversy.

The petitioners herein, respondents in the lower Court, denied all of the material allegations of Hart's petition and affirmatively alleged specific instances in which lessee had failed to faithfully comply with the terms of the lease (R. 63-74, 79-82, 86-91, 104, 111); also affirmatively alleged that Hart as trustee had not at any time assumed the lease pursuant to provisions of Section 70b of the Bankruptcy Act or otherwise or at all and "* * * that said * * * Hart * * * did not on December 3, 1943, or at any time have any authority or right or power under or pursuant to said lease or otherwise to make application for or demand or receive any further lease of said mine or

any renewal or extension thereof" (R. 86) and that Hart's application to lessors for a further lease did not constitute an authoritative or legal application for a further lease upon said mine. (R. 86.)

The trial was by the Court. Evidence was introduced on the trial, without objection, as to numerous failures of the lessee to faithfully comply with the agreements, covenants and conditions of the lease and option for a further lease. There was no evidence to the contrary. The greater part of the testimony as to failures of the lessee to pay current royalties on or before the 25th day of the month next following the month in which the mint or smelter returns were received by the lessee was given by Wilbur E. Thain, on cross-examination. Thain was a public accountant and witness for trustee Hart.

Following is a partial list of the breaches by the lessee:

(1) Mount Gaines as lessee failed "to keep complete records of operations, accounts and production" to the extent that it was impossible for the certified public accountant employed by the trustee in bankruptcy to audit the books of Mount Gaines Mining Company, to determine from its books, accounts and records from the beginning of its mining operations in December, 1934, under the lease down to April, 1938, what was its "production" or "returns" from each lot of bullion or concentrates shipped by it to the mint or smelter, or when it received its returns from each such lot or its "royalty liability" on each such return. (R. 924, 925, 1266, 1267, 1348.) Addi-

tional failures to keep complete records. (R. 341, 354, 393, 906, 912, 913, 1263, 1264, 1265.)

(2) Following is a list of specific failures of Mount Gaines as lessee to pay at all or in full royalties payable pursuant to said lease not later than the 25th day of the month following the month in which the lessee received the mint or smelter returns:

$1358.70 underpayment in royalties due May 9, 1938, of which a part remained unpaid until October, 1938. (R. 1053.)

$773.52, net underpayment of royalties on August 11, 1939, as testified by Thain. (R. 1255.)

During Thain's cross-examination, Mr. Tucker, attorney for the Securities & Exchange Commission, propounded the following question:

> Mr. Tucker. And from what period does that underpayment stem?
>
> Mr. Thain answered: "Well, it stems of course, right from the beginning of operations in 1934. As indicated, the underpayment occurred in the first two periods, the Ilseng, and the Humphrey period."
>
> Q. "That is the period prior to May 9, 1938, yes." (R. 1256.)

$1857.66 "delinquency" in royalties on May 9, 1938, as testified to by Thain. (R. 1373.)

$1280.52 in royalties due on smelter returns which royalties became delinquent on June 26, 1938. A check for this $1280.52, with letter of transmittal was mailed by State Trustee Trask from La Jolla, California, to C. P. T. & T. Co., San Francisco on June 27, 1938. Date of delivery by letter unknown.

The letter of transmittal (R. 561) states:

> "* * * we have been unable to arrange to have this check reach your office on the 25th.
>
> "Royalty for March was already in arrears when the trustees took over control.
>
> "For the month of April production at the mine was barely sufficient to meet running expenses and certain other emergency and absolutely necessary heavy expenditures in the first half of May. The trustees were therefore compelled to let the April royalty go by default. It is now hoped that the earnings are improving sufficiently to make possible the gradual clearing off of the arrears * * *." (R. 561-562.)

$561.45 default in royalties payable in January, 1936. Check dated May 2, 1936, issued for these royalties on May 2, 1936. (Ilseng's testimony.) (R. 800-801.)

$613.61 default in royalties payable in February, 1936. Check postdated May 9, 1936, issued for these royalties on May 2, 1936. (Ilseng's testimony.) (R. 800-801.)

$413.68 default in royalties payable in March 1936. Check postdated May 15, 1936, issued for these royalties on May 2, 1936. (Ilseng's testimony.) (R. 800-801.)

$1358.70 underpayment in royalties during the second period of operations of Mount Gaines by Mount Gaines from 10/8/37 to 5/9/38 or a total underpay-

ment of royalties during said two periods of $1857.66, according to Hart's testimony. (R. 1053.)

(3) There was also evidence of forty-three (43) violations by lessee of the mine safety orders of the California Industrial Accident Commission, twenty-one (21) of which are detailed in the dissenting opinion of Judge Denman of the Circuit Court of Appeals for the Ninth Circuit herein. (R. 1440-1444.)

As both the majority and dissenting opinions in the Circuit Court of Appeals below concede that many violations of the lease occurred we refrain from detailing more of them.

Final judgment in the District Court in said cause was entered October 30, 1945, in favor of James P. Hart as trustee, petitioner. (R. 136-140.)

On November 29, 1945, petitioners herein (respondents in the trial Court) appealed to the Circuit Court of Appeals for the Ninth Circuit from the judgment of the District Court. (R. 146.)

On January 8, 1947, the Circuit Court of Appeals affirmed the said judgment of the District Court. (R. 1449-1450.) On February 7, 1947, petitioners herein (appellants) filed their petition for a rehearing by the Circuit Court of Appeals which petition was denied on March 24, 1947, on which date the Circuit Court of Appeals filed its opinion of January 8, 1947, as amended March 24, 1947. (R. 1450-1451.) A dissenting opinion was filed by Denman, Circuit Court of Appeals judge. (R. 1434-1449.)

GROUNDS OF DECISION OF CIRCUIT COURT OF APPEALS.

The decision of the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court on the following grounds:

(1) The trustee in the Chapter X reorganization proceeding will be deemed to have *assumed* the mining lease which was an asset of the debtor as lessee, notwithstanding "no writing was found which expressly so provided" from the fact that the trustee took possession of and operated the leased premises as a mine and paid royalties called for by the lease to lessors as directed by the Court". (R. 1413-1416.)

> "(2) Lessors by reason of their recognition of the operation of the mine by Hart as the trustee and the acceptance of the benefits resulting from such operation are in no position to question his assumption of the lease." (R. 1416.)
>
> "(3) The assumption, rejection and automatic rejection provisions of Sec. 70b are inconsistent with and inapplicable to Chapter X reorganization proceedings." (R. 1418.)
>
> "(4) The trial court was correct in holding appellee's application extended the lease for an additional term of ten years on the same terms as the original lease." (R. 1421.)
>
> "(5) Under the terms of the lease faithful performance is the requirement. * * * But a readiness on the part of the lessees to comply when violations were called to their attention is evidenced by the fact that before the Industrial Accident Commission was required to take steps which might have slowed production or otherwise injured lessor, all violations were corrected." (R. 1431.)

(6) In the event the option for a renewal lease had terminated because of the failure of the lessee to faithfully comply with the conditions precedent in the option, the trustee would thereby incur "a loss in the nature of a forfeiture" in which event the trial court would have the power under California Civil Code Sec. 3275, to relieve the trustee from such loss

> "upon *making full compensation* * * * except in case of a grossly negligent, wilful or fraudulent breach of duty * * *. The lower court found, and we think correctly, that there was no "grossly negligent, wilful, or fraudulent breach of duty * * * full compensation has been made to the lessor in the sense that all of the deficiencies have been made up * * *". (R. 1433.)

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding that "the assumption, rejection and automatic rejection provision of Sec. 70b (of the Bankruptcy Act) are inconsistent with and inapplicable to Chapter X reorganization proceedings." (R. 1416.)

2. In holding that the operation of the leased premises by the trustee and the payment by the trustee of royalties called for by the lease "clearly demonstrated that he (the trustee) did" assume the lease notwithstanding "no writing is found which expressly so provides." (R. 1413.)

3. In holding that the lessors by reason of their recognition of the operation of the leased premises by

the trustee and the acceptance of the benefits resulting from such operation are estopped to raise the question that the trustee had never assumed the lease in question and never acquired any title or rights under it. (R. 1416.)

(4) In holding in effect that the trial Court was not bound to give any force or effect to the provision in the lease that "time is the essence of this agreement" for the reason that: "the trial Court found no deviation from faithful performance of the lease because of any gross, negligent, wilful, or fraudulent breach of duty" and the owners were not damaged by reason of any failure of the lessee or trustee to faithfully comply with the agreement and provisions of the lease. (R. 1431.)

(5) In holding "* * * we think that he (trustee) has sufficiently complied with the conditions precedent in the option for a renewal lease." (R. 1432.)

(6) In holding that the trial Court under California Civil Code Section 3275 could relieve the lessee from a "loss in the nature of a forfeiture" resulting from the termination of the option for a renewal lease by reason of the breach by lessee of the conditions precedent in the lease and option, there having been "no grossly, negligent, wilful or fraudulent breach of duty" by the lessee. (R. 1432.)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

A.

The decision of the Circuit Court of Appeals that "* * * we hold that the assumption, rejection and automatic rejection provisions of Sec. 70b are inconsistent with and inapplicable to Chapter X reorganization proceedings." (R. 1418.)

is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit on the same matter in the case of *Wiemeyer v. Koch,* 8 Cir. 152 F. 2d 230. In the *Wiemeyer* case, the Court held (8 Cir. 152 F. 230-234):

> "Section 70, sub. (b) of the Bankruptcy Act as amended June 22, 1938, C. 572, Sec. 1, 52 Stat. 879, 11 U. S. C. A. Sec. 110, sub. (b), provides in part as follows:
>
> 'Within sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property: *Provided, however,* That the Court may for cause shown extend or reduce such period of time. Any such contract or lease not assumed or rejected within such time, whether or not a trustee has been appointed or has qualified, shall be deemed to be rejected'.
>
> "Under reorganization proceedings the rights of a lessor and of a debtor relative to a lease are substantially the same as those prevailing in equity receiverships. (Finn v. Meighan, 325 U. S. 300, 65 S. Ct. 1147; In re Walker, 2 Cir. 93 F. (2d) 281 * * * "
>
> "Here there was no formal adoption of this lease either within sixty days limited by the

statute nor at any subsequent time. The court, however, from time to time ordered payment of rent as provided in the lease and the payments made by the trustee were all at the rate so provided. It is insisted that this was tantamount to an adoption of the lease but the lease was certainly not assumed within sixty days from the adjudication and it was therefore deemed to be rejected. The statutory presumption of rejection by nonaction within the period of sixty days is a conclusive statutory presumption. (Collier on Bankruptcy, 14 Ed. Sec. 70.43, p. 1230). The period might have been extended for cause shown but it was not so extended."

B.

The decision of the Circuit Court of Appeals to the effect that Hart as trustee in a Chapter X reorganization proceeding could and did assume the mining lease *cum onere,* merely by operating the leased premises and paying the lessors money in amounts equal to cash royalties payable currently pursuant to the lease but (1), without applying to the District Court for, and (2), without obtaining from it an order authorizing him to assume the lease, and (3), without any formal declaration by him that he assumed the lease, is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit on the same matter in the case of *In re Walker,* 93 F. (2d) 281; also in conflict with the decision of the Circuit Court of Appeals for the Eighth District on the same matter in the case of *Wiemeyer v. Koch,* 8 Cir. 152 F. (2d) 230.

In the *Walker* case, the Court held (2 Cir. 93 F. (2d) 281):

> "Nor can we see that the situation changes where there is no receiver, but a debtor is continued in possession under subdivision (c) (11) of Section 77(B) 11 U. S. C. A. sec. 207 (c) (11). Such debtor does not pay as lessee; it may not do so, it is forbidden to affirm a lease without order of the court, and the payment of rent as rent would be as much an affirmance, if lawful, as is the lessor's acceptance. Its position as debtor, 'continued in possession', is for all purposes that of a trustee or receiver, as we have said."

In the *Wiemeyer* case the Court held (8 Cir. 152 F. (2d) 230-234):

> "Payment of rent upon the property of the trustee is not to be taken as rent in the sense of money due under the lease, but as payment for the use and occupation of the property so that the payment of compensation does not of necessity recognize the continued existence of the lease. In re Walker, supra; Moore v. Risley, 9 Cir. 287 F. 10; Model Dairy Co. v. Foltis-Fischer, 2 Cir. 67 F. (2d) 704.
>
> "Here there was no formal adoption of the lease either within the sixty days limited by the statute nor at any subsequent time. The court, however, from time to time ordered payment of the rent as provided in the lease and the payments made by the trustee were all at the rate so provided. It is insisted that this was tantamount to an adoption of the lease but the lease was certainly not assumed within sixty days from the

adjudication and it was therefore deemed to be rejected. The statutory presumption of rejection by nonaction within the period of sixty days is a conclusive statutory presumption. (Collier on Bankruptcy, 14 Ed. Sec. 70.43, p. 1230. * * *"

"There was however, an obligation to pay the reasonable value of the use and the payments made pursuant to order of court must, we think, be held to be payments not under the lease, but as the reasonable value of the use of the premises."

* * * * * * *

"Neither the various petitions filed by the lessors nor the various petitions filed by the trustee asking for instructions as to the payment of delinquent rent revealed to the court a proposal to assume the lease in its entirety, and it cannot be said from the record that the trial judge knew or even suspected that he was being called upon to approve or adopt the entire contract."

The allegations by trustee Hart in his petition filed in the District Court on November 24, 1943: "That the said lease and option to purchase are the sole assets of the *Mount Gaines Mining Company* * * *" (R. 969); the order of the District Court based on Hart's said petition made and entered December 2, 1943, that Hart should "immediately file his written application and make a demand for an extension of the agreement of lease with option to purchase now owned by the *Mount Gaines Mining Company*" (R. 972); and Hart's allegations in his petition filed in the District Court on September 9, 1944:

> "That the refusal of the respondent, Title Insurance and Guaranty Company * * * to execute written evidence of the right of the Mount Gaines Mining Company to occupy, hold and operate the said mining claims, has cast a cloud upon the right and title of the Mount Gaines Mining Company to hold, operate and to sell and dispose of the ores mined on said Mount Gaines Mine, and will * * * depreciate the value of the assets of the said Mount Gaines Mining Company" (R. 35)

are both declarations by Hart as trustee, and a judgment by the District Court, that Hart as trustee never assumed said lease or any option therein. If Hart had assumed the lease he would thereby have "acquired such rights and obligations under the lease as the lessee had." (*Smith v. Hoboken, R. W. & S. C. Co.*, 328 U. S. 123-133, 90 L. Ed. 1123.)

The trustee's assumption of an executory contract operates as a complete transfer of all the bankrupt's contractual rights and contractual liabilities therein. (14 Collier on Bankruptcy, Vol. 4, p. 1255, par. 270.43; *Grief Bros. Cooperage Co. v. Mullins* (8 Cir.) 264 F. 391.) The transfer involves a complete elimination of the bankrupt, his discharge from his contractual relations and his replacement by the trustee. (*Rosenblum v. Uber* (3rd Cir.) 256 F. 584.)

In *Palmer v. Palmer* (2nd Cir.) 104 F. (2d) 161, the Court held:

> "A lease, being property cum onere, does not pass to a trustee in bankruptcy unless he adopts it."

This view was approved by the Supreme Court of the United States in *Smith v. Hoboken, R. W. & S. C. Co.*, 328 U. S. 123-135, 90 L. Ed. 1123. Moreover, the clerk of the District Court in the certificate attached to the transcript certified:

> "I further certify that after diligent search of the records I am unable to find any record in this court and in this matter of any adoption or assumption by James B. Hart, Trustee, of that certain mining lease dated December 16, 1933, a copy of which lease is attached to the petition of James B. Hart filed in this proceeding September 9, 1944 and designated Exhibit A thereto." (R. 148.)

and the Circuit Court of Appeals in the instant case states in its opinion that "no writing was found which expressly * * * provides" that Hart as trustee ever assumed the lease. (R. 1413.)

C.

The decision of the Circuit Court of Appeals that:

> "It would seem that lessors, by reason of their recognition of the operation of the mine by Hart, as trustee, and acceptance of the benefits resulting from such operation are in no position to question his assumption of the lease" (R. 1416)

is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit on the same matter in the case of *Model Dairy Co. v. Foltis-Fischer, Inc.*, 67 F. (2d) 704. The Court held in that case:

> "The receiver does not take over the term, when he goes into possession by the court's order, or before his own election. * * * The court puts

him there by its own power; the lessor has nothing to say about it. He must take what compensation the court chooses to give him, or he will get nothing; his acceptance cannot be a recognition of a termor whom he had no power to exclude."

D.

The decision of the Circuit Court of Appeals to the effect that

> "the assumption, rejection and automatic rejection provisions of Sec. 70b are inconsistent with and inapplicable to Chapter X reorganization proceedings" (R. 1418)

involves an important question of federal law which has not been, but should be settled by this Court, although it is not determinative of this case.

The importance of this question is apparent from a comparison of the opinion of the Circuit Court of Appeals in this cause with the decision in *Wiemeyer v. Koch,* 8 Cir., 152 F. (2d) 230, and the decision of this Court in *Finn v. Meighan,* 325 U. S. 300, 89 L. Ed. 1624.

In the case at bar the Circuit Court of Appeals held:

> "In the ordinary bankruptcy which Sec. 70b covers, the purpose is to liquidate the estate and to distribute the assets to creditors as soon as possible. Since continued operation of a lease held by the ordinary bankrupt is not contemplated, the trustee is required to decide whether the lease has any value, and if so, to dispose of

it quickly so that the assets realized may be added to the bankrupt's estate.

But in reorganization proceedings the purpose is rehabilitation of the debtor and to preserve it as a going concern if possible; therefore, it is vital that favorable leases be held and unfavorable leases be rejected. But often it cannot be decided by the trustee within 60 days after adjudication (particularly when the trustee is not appointed until some time after the adjudication) whether a lease is favorable or not from the standpoint of continued operation. Here the lease was the sole asset of the debtor and rejection of the lease would have ended any possibility of reorganization. Consequently, the debtor was ordered by the District Court to continue in possession under the lease until the plan of reorganization could be prepared, and when the lease was about to expire, the Court ordered the trustee to apply for a renewal in accordance with the terms of the lease.

The difference between this situation and the situation normal to the usual bankruptcy covered by Sec. 70b, is decisive, and, hence, we hold that the assumption, rejection, and automatic rejection provisions of Sec. 70b are inconsistent with and inapplicable to Chapter X reorganization proceedings.

Finn v. Meighan, 325 U. S. 300, cited by appellants, is limited, by a subsequent modification by the Supreme Court of its original opinion, to the forfeiture provisions of Sec. 70b, not here involved (325 U. S. 300, 302, 840)."

In *Finn v. Meighan,* Jr. 325 U. S. 300, 89 L. Ed. 1625, at page 301, this Court held:

"Childs Company operates a chain of restaurants. In August 1943 it filed a voluntary petition for reorganization under Chapter X of the Bankruptcy Act (June 22, 1938). * * *

* * * * * * *

"Congress granted the trustee sixty days (unless reduced or extended) in which to assume or reject a lease. Sec. 70(b) of the Bankruptcy Act as amended, 11 U.S.C.A. Sec. 110(b), 3 FCA Title 11, Sec. 110(b)."

It is to be remembered that this Court in its amended opinion in the *Finn* case left undisturbed therein the foregoing paragraph. Not having the record of this Court in the *Finn* case before us, we are unable to determine what effect should be given to *that* paragraph.

E.

The decision of the Circuit Court of Appeals to the effect that a trustee in a Chaper X reorganization proceeding in bankruptcy can assume a lease which is an asset of the debtor, merely by taking possession of the leased premises, operating it and paying rent or royalty to the lessors as called for by the lease, without obtaining an order of Court authorizing him to assume the lease and without any declaration by him in writing that he assumed it, involves an important question of federal law which has not, but should be, settled by this Court.

The importance of this question is patent by comparing the decision of the Circuit Court of Appeals in this case with the decision in *Wiemeyer v.*

Koch, 8 Cir., 152 F. (2d) 230, quoted under heading "B" on pages 19-20 hereof.

F.

The decision of the Circuit Court of Appeals to the effect that Hart as trustee had "sufficiently complied with the conditions precedent" in the option for a further lease which would be a ten year extension of the lease involved herein, is a decision of an important question of local California law in conflict with applicable California decisions and statutes, viz.:

Berhman v. Barto (1880), 54 Cal. 131, 70 A.L. R. 1219;

Swift v. Occidental Mining, etc. Company (1903), 141 Cal. 161, 173, 74 Pac. 700;

Waterman v. Banks, 144 U. S. 394, 36 L. Ed. 479;

Mariposa Construction v. Peters, 215 Cal. 134, 142, 8 Pac. (2d) 849;

Bourdien v. Baker, 6 Cal. App. (2d) 150, 44 P. (2d) 587;

Caldwell v. Delaray Mines, Inc., 68 Cal. App. (2d) 180, 156 P. (2d) 52.

California Civil Code, Section 1436:

"A condition precedent is one which is to be performed before some right dependent therein accrues, or some act dependent thereon is performed."

California Civil Code, Section 1439:

"Before any party to an obligation can require another to perform any act under it he must ful-

fill all conditions precedent thereto imposed upon himself * * *."

Rusconi v. Cal. Fruit Exch., 100 Cal. App. 750, 755, 281 Pac. 84;

De Falaise v. Gaumont-Butioli Corp., 39 C.A. (2d) 461, at 468-9, 103 Pac. (2d) 447.

California Civil Code, Section 1587:

"A proposal is revoked:

1. * * *

2. * * *

3. By the failure of the acceptor to fulfill a condition precedent to acceptance; * * *."

Bourdien v. Baker, 6 Cal. App. (2d) 150, 44 P. (2d) 587.

See dissenting opinion of Denman, C.J., to the decision of the Circuit Court of Appeals in the instant case. (R. 1434-1449.)

In the *Berhman* case the Supreme Court of California held (54 Cal. 131 at 134):

"Payment of rent when it becomes due, and performance of other covenants of a lease, under which a tenant in possession of leased premises with the privilege of renewing the lease at the end of the term, are conditions precedent to the exercise of the right of renewal. When, therefore, the defendant in this action, as tenant under the lease from the plaintiff, made default in payment of the last installment of rent at the time it became due, and failed to perform the covenants of the lease as to payment of taxes and assessment liens, her possession of the leased premises, after the expiration of the term, did not

operate as notice to plaintiff that she had elected to continue the term, nor did it work a renewal of the lease; for her right to renew depended upon the performance by her of her covenants in the lease.

In the *Swift* case, the Supreme Court of the State of California held (141 Cal. at 173, 74 Pac. p. 700):

> "We are not sure that the respondent means to contend that the failure of appellants to insist upon forfeiture of the lease for waste or breach of covenant, precludes them from refusing to grant another term though there are passages in his brief which seem to assert that proposition. If the contention is made it cannot be sustained. The waiver of the forfeiture is one thing; the renewal of the lease is quite another. The neglect of the landlord to strictly enforce his right of forfeiture for breach of condition does not entitle the tenant to a renewal when such renewal is dependent upon faithful performance of conditions."

It will be noted that the Circuit Court of Appeals in its decision herein refused to follow the decision in the *Swift* case upon the ground, as claimed by it, that it was dictum. (R. 1430.) Denman, C. J., in his dissenting opinion evidently considered that the decision in the *Swift* case was *not* dictum. (R. 1438-1439.) In any event it was at least a "considered dictum." And this Court has held that Federal Courts are bound to accept a "considered dictum" of the highest state Court as controlling.

In *Hawks v. Hammill,* 288 U. S. 52-58-59 (77 L. Ed. 610), the Court held:

> "At least it is a considered dictum and not comment merely *obiter*. It has capacity though it be less than a decision, to tilt the balanced mind toward submission and agreement."

In the *Waterman* case, which involves California local law, this Court held (144 U. S. 294, 36 L. Ed. 479):

> "On the other hand, it is well settled that when there is a contract between the owner of land and another person, and if such person shall do a specific act, then he (the owner) shall convey the land to him in fee, the relation of vendor and purchaser does not exist between the parties unless and until the act has been done as specified. The Court regards it as the case of a condition, in the performance of which the party performing it is entitled to a certain benefit; but in order to obtain such benefit he must perform the condition strictly. Therefore, if there be a day fixed for its performance, the lapse of that day without it being performed prevents him from claiming the benefit."

G.

The decision of said Circuit Court of Appeals to the effect that the District Court, pursuant to California Civil Code Sec. 3275, could relieve Hart as trustee from a "loss in the nature of a forfeiture" resulting from a termination of the option for a further lease because of the lessee's and the trustee's inability to comply with the conditions precedent in the option for a further lease, is a decision of an *important question of local law* in a way probably in conflict with applicable local decisions, viz.:

Briles v. Paulson, 170 Cal. 196, 149 Pac. 169;
Henck v. Lake Hemet Water Co., 9 Cal. (2d) 136, 69 P. (2d) 849;
Leslie v. Federal Finance Company, Inc., 14 Cal. (2d) 73, 80, 92 P. (2d) 910;
Wightman v. Hall, 62 Cal. App. 632, 217 Pac. 580, cited with approval in *Leslie v. Federal Finance Company, Inc.,* 14 Cal. (2d) 73, 80, 92 P. (2d) 910;
California Civil Code, Section 1492;
California Civil Code, Section 3275.

In the *Briles* case the Supreme Court of the State of California (170 Cal. 196, 149 Pac. 169), held:

> "The defendant could not convert the option into an agreement of sale, binding upon the plaintiff, except by complying with the conditions upon which the plaintiff had agreed to sell * * * Acceptance must be made and conditions performed within the time, if any, limited by the option, in order to constitute a contract of sale, time being of the essence in such contracts * * *. A court of equity would not be justified in relieving a party from the effect of his failure to comply with the conditions on which he had been granted the privilege of buying. This would be making a new contract for the parties, and compelling the owner to sell when he had not agreed to do so."

In *Henck v. Lake Hemet Water Co.* (1937), 9 Cal. (2d) 136, 69 P. (2d) 849, the Supreme Court of California laid down the rule that California Civil Code Section 3275 is not applicable to an option which involves a *condition precedent, neither is it*

applicable where time is expressly declared to be of the essence, as is the case in the action at bar. In that case the Court said in effect that California Civil Code Sections 3275 and 1492 apply only where there is a vested estate subject to be defeated by a *condition subsequent* and not in cases where there is a condition precedent as is the case where rights are classed under an option. (See Vol. 9 Cal. (2d), pp. 140-142.)

The Court in that case held (page 143):

> "The provisions of section 3275 are necessarily qualified by the language of Section 1492, so that generally in a case where time is made the essence of the agreement a party may not obtain relief under that section."

Following are the two Code Sections cited in the *Henck* case:

Section 1492 of the California Civil Code:

> "Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due * * *."

Section 3275 of the California Civil Code:

> "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

In the *Leslie* case the Supreme Court of California held (14 Cal. (2d) 73 at 80, 92 Pac. (2d) 906):

> "It is true that time is of the essence of the ordinary option contract and no forfeiture results from a strict performance of its terms, because an option is merely an offer to sell and vests no estate in the property to be sold. (Wightman v. Hall, 62 Cal. App. 632, 217 Pac. 580.)"

In the *Wightman* case, the District Court of Appeal of California (62 Cal. App. 632, 217 Pac. 580) held:

> "A full appreciation of the nature of an option precludes the idea that courts may allow the optionee time beyond that limited in the writing in which to accept the offer of the other party. With the lapse of time the right to exercise the option automatically expires. In this regard it is similar to an estate upon limitation, which terminates without any act of those claiming the estate to succeed to it. It is not necessary for the offerer of an option to notify the optionee that the offer is no longer open when the time limit has expired. It is not a case of cancellation of a right, for the right only existed up to a certain time and then ceased by the mere passing of that time."

This case was cited with approval in *Leslie v. Federal Finance Co., Inc.*, 14 Cal. (2d) 73 at 80, 92 Pac. (2d) 910.

Petitioners pray that a writ of certiorari be granted.

Dated, June 18, 1947.

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